United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

No. 75-6126

In the United States Court of Appeals
for the Second Circuit

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INTERSTATE COMMERCE COMMISSION, PLAINTIFF-APPELLEE,

v.

ASSOCIATED AIR FREIGHT, INC., DEFENDANT-APPELLANT.

P/S

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR APPELLEE

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INDEX

	Page
STATEMENT OF THE CASE	1
APPLICABLE STATUTES	3
ISSUE PRESENTED	5
ARGUMENT:	
I. The District Court Correctly Interpreted the Law by Granting to the Commission Permanent Injunctive Relief	5
II. Dual Jurisdiction for the Examination of Records is Permissible	9
III. No Serious Constitutional Issue is Raised by Plaintiff's Demand to Examine Records	11
IV. Part IV of the Interstate Commerce Act Contains Both Subpoena and Inspectional Authority	13
V. A Licensed Surface Forwarder Possesses No Substantial Expectation of Privacy From Inspections Conducted by its Licensor	16
VI. The Congressional Determination Embodied in Section 412(d) Concerning the Scope of Records Subject to Inspection Authority is Reasonable Within the Meaning of the Fourth Amendment	18
VII. Under all the Circumstances of this Case, the Inspection Sought to be Exercised is Reasonable	20
CONCLUSION	22

TABLE OF CASES

Burlington Northern, Inc. v. *Interstate Commerce Commission*, 462 F.2d 280 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 891 (1972)	8
Civil Aeronautics Board v. *United Airlines, Inc.*, 399 F. Supp. 1324 (N.D. Ill. 1975)	9, 13
Colonnade Catering Corp. v. *United States*, 397 U.S. 72 (1970)	18
Cooper's Express, Inc. v. *Interstate Commerce Commission*, 330 F.2d 338 (1st Cir. 1964)	6, 12, 18, 19
Fleming v. *Montgomery Ward & Co.*, 114 F.2d 384 (7th Cir. 1940), *cert. denied*, 311 U.S. 690 (1940)	19
Interstate Commerce Commission v. *Goodrich Transit Co.*, 224 U.S. 194 (1912)	10
Katz v. *United States*, 389 U.S. 347 (1967)	16

Cases—Continued

	Page
Oklahoma Press Publishing Co. v. *Walling*, 327 U.S. 186 (1946)	17
Ray v. *United States*, 374 F.2d 638 (5th Cir. 1967), *cert. denied*, 389 U.S. 833 (1967)	14, 19
United States ex rel. Terraciano v. *Montayne*, 493 F.2d 682 (2nd Cir. 1974), *cert. denied*, 419 U.S. 875 (1974)	19
United States v. *Biswell*, 406 U.S. 311 (1972)	18, 21
United States v. *Louisville & Nashville Railroad Company*, 236 U.S. 318 (1915)	8
United States v. *Morton Salt Co.*, 338 U.S. 632 (1950)	17
United States v. *Clyde S.S. Co.*, 36 F.2d 691 (2nd Cir. 1929)	8, 12
United States v. *Alabama Highway Express*, 46 F. Supp. 450 (N.D. Ala. 1942)	12

Statutes:

12 U.S.C. § 1820(b)	14
18 U.S.C. § 2	15
49 U.S.C. § 12(1)	13
49 U.S.C. § 20	8
49 U.S.C. § 302(c)(2)	12
49 U.S.C. § 1002(a)(7)	10
49 U.S.C. § 1004(a)	11
49 U.S.C. § 1012(d)	3, 5, 7, 9
49 U.S.C. § 1017(a)	13
49 U.S.C. § 1017(b)(1)	4
49 U.S.C. § 1021(e)	21
49 Code Fed. Regs. § 1221.15	11

Miscellaneous:

1 *Davis, Administrative Law Treatise* § 3.06 (1958)	15
2A *Sutherland, Statutes and Statutory Construction* §§ 46.01 and 46.06 (4th Ed. 1973)	7

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BRIEF FOR APPELLEE

STATEMENT OF THE CASE

This action was instituted by the Interstate Commerce Commission (hereinafter called the Commission or I.C.C.) upon the filing of the Complaint under date of July 30, 1975. It sought issuance of an injunction to require defendant, Associated Air Freight, Inc. (hereinafter called Associated), a surface freight forwarder licensed by the Commission, to submit any and all of its accounts, books, records, memoranda, correspondence, and other documents, to examination and copying by authorized employees of the Commission.

The Commission's Complaint alleged that Associated was and is an authorized interstate surface freight for-

warder and the holder of a Permit issued by the Commission to Associated on March 13, 1973; that Associated also held authority as an air freight forwarder from the Civil Aeronautics Board; that on January 13, 1975, the Commission's authorized representative and employee, Louis P. Bussolati, presented and identified himself at plaintiff's place of business at Jamaica, Queens, New York, and requested Associated's vice president to produce for examination Associated's records relating to certain air freight forwarding operations in and around Minneapolis, Minnesota; including air freight forwarding bills of lading and records of payment to motor carriers related to operations in and around Minneapolis, Minnesota; that a visual examination was at first allowed but copying was refused and that after some discussion, Associated thereupon refused any access to such records; that following this refusal, the Commission representative made two (2) formal written demands upon Associated for access to its books, records, and other papers including a demand for Associated's "Transportation Records"; that Associated has since maintained its refusal to allow examination or copying of its books and records; that by a letter of January 20, 1975, from Associated's president to the Commission's New York City office, Associated stated that it did not allow access to its air freight forwarder records and documents except to the Civil Aeronautics Board; that Associated's records could be examined by the Commission by contacting Associated's terminal managers at nine (9) points throughout the country; that on January 30, 1975, the Commission's Assistant Regional Director presented himself at Associated's place of business and asked Associated's president to permit the inspection because Associated was the holder of an I.C.C. Permit; that Associated's president said that Associated was not refusing to permit the inspection but that since Associated was not performing any operations under its I.C.C. Permit,

Associated had no records available for inspection by the Commission.

On or about September 18, 1975, Associated filed a motion to dismiss the Complaint on the ground that the Court was without jurisdiction over the subject matter, and that the Complaint failed to state a claim for which relief could be granted. The Commission replied to the motion to dismiss and the District Court denied Associated's motion to dismiss on October 3, 1975. Associated filed its answer on October 14, 1975. On November 6, 1975, the Commission filed a motion for summary judgment and after a brief oral argument, Judge Jack B. Weinstein granted that motion on November 11, 1975, with a supporting opinion. The order of injunction was entered on November 24, 1975. Associated then filed its notice of appeal on November 25, 1975, and Judge Weinstein stayed the order of injunction pending Associated's appeal to this Court.

By its answer to the Complaint, Associated admitted that it is the holder of a surface freight forwarder Permit issued to it by the Commission; that Associated admitted that it refused Commission representatives "to make copies of certain documents"; that Associated admitted that it received letters from the Commission which demanded access to Associated's books and records; and that Associated admitted that it refused and continues to refuse to permit access to its books and records by representatives of the Commission. Thus, there are no material facts in dispute relative to the alleged refusals. It is equally clear that Associated's refusal is based on the claim that its currently maintained records are not subject to examination and copying by the Commission.

APPLICABLE STATUTES

Title 49, U.S. Code, Section 1012(d), which provides for inspection and copying by the Commission of Asso-

ciated's books, records, and other papers, reads as follows:

> The Commission or its duly authorized special agents, accountants, or examiners shall at all times have access to and authority, under its order, to inspect and examine any and all lands, buildings, or equipment of freight forwarders; and shall have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents of freight forwarders and of associations (as defined in this section), and such accounts, books, records, memoranda, correspondence, and other documents of any person controlling, controlled by, or under common control with any freight forwarder, as the Commission deems relevant to such person's relation to or transactions with such freight forwarder. Freight forwarders and persons shall submit their accounts, books, records, memoranda, correspondence, and other documents for the inspection and copying authorized by this subsection, and freight forwarders shall submit their lands, buildings, and equipment for examination and inspection, to any duly authorized special agent, accountant, or examiner of the Commission upon demand and the display of proper credentials.

Jurisdiction to grant the relief is conferred on the District Court by Title 49, U.S. Code, Section 1017(b)(1) which provides as follows:

> If any freight forwarder fails to comply with or operates in violation of any provision of this part, or any rule, regulation, requirement, or order thereunder, or of any term or condition of any permit, the Commission or the Attorney General of the United States (or, in case of such an order, any party injured by the failure to comply therewith or by the violation thereof) may apply to any district court of the United States having jurisdiction of the parties for the enforcement of such provision of this part or of such rule, regulation, requirement,

order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ or writs of injunction or other process, mandatory or otherwise, restraining such freight forwarder and any officer, agent, employee, or representative thereof from further violation of such provision of this part or of such rule, regulation, requirement, order, term, or condition, and enjoining obedience thereto.

ISSUE PRESENTED

Whether the Interstate Commerce Commission, pursuant to 49 U.S.C. 1012(d) shall have access to and authority to inspect and copy the records of a corporation authorized to engage in freight forwarder operations pursuant to a permit granted by the said Commission.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY INTERPRETED THE LAW BY GRANTING TO THE COMMISSION PERMANENT INJUNCTIVE RELIEF

The lower court held that under the statute, (49 U.S.C. 1012(d)) the Commission has the clear right to examine the books and records of surface freight forwarders to determine what their activities are and whether they are complying with the law and regulations (A-72). Associated's motion to dismiss and its position before this Court is based on the contention that the Complainant alleges no facts upon which this Court can reasonably conclude that defendant has denied plaintiff access to records of a freight forwarder under the jurisdiction of the Commission. Yet, as the holder of such a surface freight forwarder Permit from the Commission, Associated is subject to the visitorial provisions of Part IV of the Interstate Commerce Act and that comprehensive language of the subject statute in no way limits or qualifies the Commission's right of inspection

conditioned first on the showing that the holder of such a permit was or is in fact exercising its authority under the Permit issued to it. If Associated's contention were correct, a stubborn licensee could hinder and even thwart the Commission from establishing proof of the various activities of a licensee under the Commission's jurisdiction, and thus frustrate the regulatory scheme contemplated by Congress. A similar contention was repudiated by the Court of Appeals in *Cooper's Express, Inc.* v. *Interstate Commerce Commission*, 330 F. 2d 338 (1st Cir. 1964), where at page 341 thereof, that Court said:

> It could not properly perform its duties if the regulated party had the right to say just how far an examination could go.

It continued:

> * * * [i]n view of the broad power of regulation of interstate public carriers, it is difficult to conceive of a case in which the Interstate Commerce Commission would be seeking to inspect a record or document which would not be relevant to a lawful activity of the Commission.

The distinction made by Associated between air forwarder records and surface forwarder records is meaningless in the face of the broad and comprehensive language of the empowering statute which states that *any and all* accounts, books, records, etc., must be made available to Commission examination. The statute in question goes on to provide that even the records of commonly controlled companies of freight forwarders subject to its jurisdiction are subject to the Commission's visitorial powers. This means that even if defendant chooses to operate and control in common two (2) distinct legal entities, one as an air forwarder and another as a surface forwarder, the Commission would still be entitled to examine the books and records of both entities. Associated's air and surface Permits are issued in the name of a single entity. The Commission's demand to examine

any and all records of Associated is statutorily and constitutionally authorized.

The plain meaning of the statute in question authorizes Commission inspection of any and all accounts, books, records, etc. Applying the well-recognized principles of statutory construction first that, a statute is open to construction only when it is ambiguous, and second, that effect should be given to every word, it is apparent that the statute authorizes inspection of all of Associated's records including those covering any air freight forwarding business. In reference to the "Plain Meaning Rule", *2A Sutherland, Statutes and Statutory Construction*, Section 46.01 (4th ed. 1973) states at 49:

> One who contends that a provision of an act must not be applied according to the natural or customary purport of its language must show either that some other section of the act expands or restricts its meaning, that the provision itself is repugnant to the general purview of the act, or that the act considered in pari materia with other acts, or with the legislative history of the subject matter, imports a different meaning. If the language is plain, unambiguous and uncontrolled by other parts of the act or other acts upon the same subject, the court cannot give it a different meaning.

At item 63 of Section 46.06, *2A Sutherland*, states:

> A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.

There is not a word or phrase in the language of Section 412(d) (49 U.S.C. 1012(d)) which supports the position urged by Associated. The congressional intent could not be plainer. Associated urges this Court to reject the plain and obvious meaning of the language of the statute.

It is important to note here that Associated seeks to assert the right to prevent altogether any examination of *any* of its records. Associated's argument and recital of authorities goes to the extent of the boundaries of a lawful examination and are premature at this time since it has refused to produce any records for inspection by the Commission.

Associated's emphasis upon several court decisions is entirely misplaced. The decision in *Burlington Northern, Inc.* v. *Interstate Commerce Commission*, 462 F. 2d 280 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 891 (1972) supports the Commission's position. The controversy therein arose from a congressional request for certain information which would be used to consider remedial legislation. Yet in discussing the amendment to 49 U.S.C. 20 (a statute similar to Sec. 412(d), the Court recognized the Commission's objective to gain access to correspondence relating to violations of the Interstate Commerce Act. *Supra* at 286. In citing the Commission's Twenty-Seventh and Twenty-Eighth Annual Reports, the Court in the *Burlington* case, *supra*, acknowledged the Commission's interest in examining documents in order to detect many of the ingenious devices, for rebating and otherwise violating the law. Thus it is clear that the holding in the *Burlington* case, *supra*, does not bar access to records when the Commission makes an inquiry concerning possible violations of the Interstate Commerce Act.

In *United States* v. *Clyde S.S. Co.*, 36 F. 2d 691, (2nd Cir. 1929), the Court upheld the Commission's right to examine records of movements which the defendant steamship company claimed did not move in interstate commerce. In that decision, Judge Hand said at page 693, "The Commission could not properly perform its duties if a carrier confessedly within its jurisdiction as a part of its business had the right to say just how far an examination could go". Defendant cites *United States*

v. *Louisville & Nashville Railroad Company*, 236 U.S. 318 (1915), as support for its position, but that case dealt with "correspondence" and was decided prior to the amendment to Section 20 of Part I of the Act to authorize access to "correspondence", and such decision is therefor not pertinent to any issue herein.

The decision of the Court in *Civil Aeronautics Board* v. *United Airlines, Inc.*, 399 F. Supp. 1324 (N.D. Ill. 1975) decided September 5, 1975, and set forth as an attachment to Associated's motion to dismiss is also not relevant or pertinent to the limited issue now before this Court. There, the Court dealt with the issue of what type of records an airline was required to produce for examination by C.A.B. employees. The dispute revolved around the distinction made by the Court between "records kept" and "records required to be kept". No such dispute exists in the instant case. Here, defendant has refused access to all records. It is noted that while there are certain similarities between the visitorial statutes of the C.A.B. and the I.C.C., 49 U.S.C. 1012(d) does not contain the phrase "kept or required to be kept" which was the subject of interpretation by the Court in the *Civil Aeronautics Board* v. *United Airlines, Inc.* case. In that decision, the Court also dealt with the distinction between a search and an examination. In the instant case, the Commission employee made a demand for Associated's records and no search was either made or attempted. Associated's argument and authorities in support of its position deal with the extent of lawful examination and specific records whereas the Complaint here under consideration alleges Associated to have refused to produce for examination and copying *any* of its records.

II. DUAL JURISDICTION FOR THE EXAMINATION OF RECORDS IS PERMISSIBLE

Associated here contends in effect that should a party be possessed of licenses from two administrative agen-

cies, then only one of those agencies may exercise its examination privileges as granted by law. Not surprisingly, it offers no authority to support this novel proposition. While it is true that the C.A.B. has exclusive authority to regulate defendant's air forwarder routes, rates, and so forth, and the I.C.C. has exclusive authority to regulate Associated's surface forwarder routes, rates, and so forth, this does not mean that the visitorial powers of each is limited by the other, and the language of the statute here under consideration is sufficiently broad so as to form a basis for the relief sought. Thus, the authority of the Commission to examine all of Associated's records in no way can be construed as an encroachment on the jurisdiction of the C.A.B. to regulate defendant's air forwarding business.

Associated's reliance on Section 402(a)(7) of the Interstate Commerce Act (Title 49, U.S. Code 1002(a)(7)) which defines "service subject to this chapter", is misplaced because that provision only distinguishes the difference between the *services* of a surface forwarder and those of an air forwarder insofar as jurisdiction of the I.C.C. and the C.A.B. with respect to routes, rates, and so forth. The existence of the right vested in the I.C.C. to *examine* Associated's records can in no way be interpreted as an infringement or encroachment of the C.A.B.'s exclusive jurisdiction to regulate the routes and rates of air forwarders. The authority granted by Congress to both the I.C.C. and the C.A.B., within this frame of reference, are constitutionally compatible.

In *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U.S. 194 (1912), the Supreme Court held that a carrier subject to the Interstate Commerce Act was required to file reports of the operation of an amusement park which formed no basis of its interstate business and stated at page 215 and 216:

> . . . if the Commission is to be informed of the business of the corporation, so far as its bookkeeping and reports are concerned, it must have full knowl-

edge and full disclosures thereof, in order that it may ascertain whether forbidden practices and discriminations are concealed, even unintentionally, in certain accounts and whether charges of expense are made against one part of a business which ought to be made against another.

III. NO SERIOUS CONSTITUTIONAL ISSUE IS RAISED BY PLAINTIFF'S DEMAND TO EXAMINE RECORDS

Inasmuch as Associated has refused to produce any records, it is premature at this point to consider whether the Commission had demanded access to records which are required to be produced.

The records initially sought to be examined related to Associated's use of motor carriers in and around Minneapolis, Minnesota, and this fact was alleged in the Complaint. Title 49, Section 1221.15, Code of Federal Regulations, lists the type of records which must be kept by Associated including the period of their retention. Among such required records are Records of Checks (Item 19 (b)), Revenue Records (Item 30-32), Voucher Disbursements (Item 40), which records relate to Associated's dealings with motor carriers and irrespective of whether those records pertain to air or surface operations by defendant. These records should have been produced.

When Associated claimed to the Commission's employee that it was conducting no operations under its I.C.C. Permit, as alleged in the Complaint, this event gave rise to the additional question as to whether Associated was meeting its duty to provide service under its I.C.C. Permit as required by Section 404(a) of the Act (Title 49 U.S.C. 1004(a)). At that point, the Commission was fully justified in demanding access to Associated's "Transportation Records", and it did so in order to determine for itself whether Associated was in fact conducting operations under its Permit with a view toward considering institution of a revocation of that

Permit or other remedies as provided for by the Interstate Commerce Act. Obviously, Associated cannot lawfully establish itself as the sole arbiter as to whether its operations are exclusively that of an air forwarder. Thus, no serious constitutional issue is raised by plaintiff's demand to examine defendant's records.

It is well settled that Congress may require a corporation engaged in a business subject to federal regulations to keep certain records and make them available for inspection in order to provide for effective administration and enforcement. *Cooper's Express, Inc.* v. *Interstate Commerce Commission, supra* at 340 citing numerous decisions. Such records assume the characteristic of quasi-public documents and their disclosure may be compelled without violating the Fourth Amendment. *Cooper's Express, Inc.* v. *Interstate Commerce Commission, supra* citing additional decisions.

Parallel sections of the Interstate Commerce Act dealing with railroads (Part I) and motor carriers (Part II) were examined by the Courts and found to be constitutional within the meaning of the Fourth Amendment. *United States* v. *Clyde S.S. Co., supra*, and *United States* v. *Alabama Highway Express*, 46 F. Supp. 450 (N.D. Ala. 1942).

As an authorized surface freight forwarder, Associated is allowed to conduct certain motor carrier operations within so-called 'terminal areas' without having to obtain motor carrier operating authority under Part II of the Act, 49 U.S.C. 302(c)(2). The Commission should have access to Associated's air bills and related records so that a determination could be made by the Commission as to whether Associated was exceeding the territorial limits of designated 'terminal areas' served by Associated whether on surface or air shipments.

IV. PART IV OF THE INTERSTATE COMMERCE ACT CONTAINS BOTH SUBPOENA AND INSPECTIONAL AUTHORITY

Associated contends that Congress could not have intended plenary inspection authority in derogation of the Commission's recognized authority to subpoena the very same records. As authority for this position, Associated relies on *Civil Aeronautics Board* v. *United Airlines, Inc., supra.*[1] That Court, ruling against the C.A.B.'s demand to inspect correspondence, stated that it would not accept such an "inconsistency" in congressional intent. The analogy that Associated seeks to establish ignores the fact that Congress authorized both subpoena power and inspection power in separate sections of Part IV of the Interstate Commerce Act which regulates interstate surface freight forwarders. The Commission's subpoena power under Section 417(a) of Part IV of the Act (49 U.S.C. 1017(a)) incorporates the provisions of Section 12 of Part I of the Interstate Commerce Act (49 U.S.C. 12(1)), and enables the Commission to require the attendance and testimony of witnesses and production of all books, records, tariffs, contracts, agreements, and documents relating to any matter under investigation. This subpoena power of the Commission is not limited to those types of carriers subject to the jurisdiction of the Commission but applies to any person subject only to a showing of jurisdictional relevance. Inspection power, on the other hand, enables the Commission to obtain immediate access to the books and records, not of any person, but of those whom the Commission directly regulates. No independent showing of jurisdictional or evidentiary relevance is necessary because of the close and pervasive nature of the relationship.

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[1] This case, which deals with the inspection authority of the C.A.B. to examine correspondence of an airline carrier is presently under appeal before the Court of Appeals for the 7th Cir. in Case Number 75-2116.

Broad visitation authority over corporations receiving benefits from the federal government is not an anomaly. *See* 12 U.S.C. 1820(b) where the Federal Deposit Insurance Corporation is authorized with respect to certain state banks to examine all the affairs of such banks and their affiliates. See also *Ray* v. *United States*, 374 F. 2d 638 (5th Cir. 1967) *cert. denied*, 389 U.S. 833 (1967), which involved an inspection by the Small Business Administration. If there is an overlap, as when the Commission elects to subpoena records and take testimony, the most that can be said is that alternative methods of information-gathering exists and that such alternatives were plainly intended by the Congress. One reason for this overlap is that Congress intended the inspection authority to be employed routinely in the regulation and inspection of surface forwarders, whereas the subpoena authority was to be used infrequently and mainly, if not altogether, in connection with adjudicatory proceedings. It is again emphasized that a subpoena may be directed to any person, whereas the inspection authority is directed to the regulated carrier and affiliated companies. It is therefore clear that Congress intended the Commission to have *both* subpoena and inspection authority, and there is no inconsistency in the existence of both powers. By granting the Commission subpoena and inspection authority over the books and records of forwarders subject to its jurisdiction, Congress has amply demonstrated that these two (2) investigatory procedures are separate tools to be employed at the Commission's discretion.

Associated's argument would have this Court hamper the Commission in significant and practical respects from discharging its comprehensive regulatory responsibilities. It is in the context of this Commission's range of regulatory responsibilities that Section 412(d) must be viewed. As Professor Davis has observed with respect to a similarly comprehensive regulatory scheme embodied in the Price Control Act: "How could programs such

as those administered by the (agency) be carried out unless the agency can get at the business facts?" *1 Davis, Administrative Law Treatise* Section 3.06 at 192 (1958).

Associated applied for and was granted its surface freight forwarder Permit by the Commission. Its acceptance of that Permit subjects it to obligations and responsibilities not required of most corporate citizens. As a licensed interstate surface freight forwarder, Associated is in effect a quasi-public utility holding its authority in trust for the public. Having conferred such benefits and having imposed such obligations upon such forwarders, Congress necessarily intended the Commission to be able to satisfy itself that corporate behavior is consistent with the law and the public interest. To effectuate this purpose, full and complete access to corporate files becomes essential, regardless whether those records are made pursuant to operations as a surface forwarder, an air forwarder or otherwise. At the time of the original demands, it was the purpose of the Commission only to inquire into the activities of trucking companies who were serving Associated in and around Minneapolis, Minnesota, and possibly other places. If a proper inspection of its records was allowed by Associated, those records may have shown violations of Part II of the Interstate Commerce Act by those trucking companies serving Associated as well as the possible aiding and abetting of those violations by Associated in violation of Title 18, U.S. Code, Section 2, or other provisions of law as administered by the Commission. Associated's refusals to allow inspection of its air freight forwarding records frustrates and stymies this Commission's responsibility to administer and enforce Part IV of the Interstantially diminished.

The Commission's authority to inspect and copy any and all accounts, books, records, etc., is undercut if the reviewable documents are limited to those which the regulated licensee decides at its pleasure to make available. Consider the situation where Associated has pos-

session and custody of some surface forwarding documents. Associated would doubtless contend in such a situation that it was required to produce to the Commission only those records made pursuant to its surface forwarding business. Thus Associated would claim the right to determine which of its records and documents are to be examined by the Commission. A regulated carrier or forwarder has a clear self-interest in not divulging unfavorable information. Thus, if Associated has the power to limit the inquiry by controlling the scope of the documents to be examined, the likelihood of uncovering information needed for sound regulatory decision-making and administration of such parties is substantially diminshed.

The Commission would also be remiss in its mandated duty of protecting the public interest if it were simply to rely on Associated's judgment as to whether certain documents related to its air forwarding operations as contrasted to documents which related to its surface forwarding operations. Plainly, such a choice does not reside in the regulatee. This Commission submits that it cannot be bound even by Associated's honest judgment in these matters. To allow Associated's judgment and opinion to determine which of its records to submit for examination would result in frequent recourse to litigation. Such suits would halt the orderly carrying out of the Commission's congressionally mandated duties and would unduly interfere with the Commission's interest in the efficient administration of a segment of the economy mandated by Congress to be controlled for the public good.

V. A LICENSED SURFACE FORWARDER POSSESSES NO SUBSTANTIAL EXPECTATION OF PRIVACY FROM INSPECTIONS CONDUCTED BY ITS LICENSOR

The "expectation of privacy", *Katz* v. *United States*, 389 U.S. 347, 361 (1967), has long been considered as

being less encompassing for a corporation than for an individual. Historically, both in this country and England, private corporations have been subject to broad visitorial power and, thus, "are not entitled to all of the constitutional protections which private individuals have. . . ." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 at 204, 205 (1946). The reason underlying why corporations can claim no equality with individuals in the enjoyment of a right to privacy was perhaps best expressed in *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), a case involving a Fourth Amendment challenge to the Federal Trade Commission's order requiring the filing of special reports by salt producers. It was recognized that broad governmental intrusion into the affairs of even unlicensed corporations engaging in interstate commerce was reasonable in an increasingly complicated world of commerce where the excesses of big business pose a serious threat to the public well-being. Therein it was stated:

> The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation . . . Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest. *United States* v. *Morton Salt Co.*, *supra*, at 652.

This very limited expectation of privacy afforded any corporation which engages in interstate commerce is further limited when the corporation owes its very existence to the grant of a federal license and which, therefore must operate in accordance with federal regulations.

In upholding the constitutionality of federal statutes providing for inspection of business records and goods of corporations authorized by license to operate in the public interest, the Supreme Court has concluded that

such licensees have no substantial expectation of privacy from inspections by the licensing authority. *See United States* v. *Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970). In essence, the Supreme Court has reasoned when an individual or corporation chooses to apply for a license to engage in a highly regulated industry, he does so with the knowledge that his goods and records will be subject to the inspection necessary to assure the performance of his regulatory obligations.

Associated has no reasonable expectation to privacy from the Commission inspection as demanded. It has knowingly and voluntarily applied for a license to engage in a regulated business and has been granted that valuable right. Having accepted the right to do business under that license, it has a corresponding duty to submit to lawful inspections of its records. A federally regulated corporation such as Associated is subject to comprehensive control and is held to the highest degree of accountability to the public. See *Cooper's Express, Inc.* v. *Interstate Commerce Commission, supra*, at 341.

VI. THE CONGRESSIONAL DETERMINATION EMBODIED IN SECTION 412(d) CONCERNING THE SCOPE OF RECORDS SUBJECT TO INSPECTION AUTHORITY IS REASONABLE WITHIN THE MEANING OF THE FOURTH AMENDMENT

Congress, by enacting Section 412(d), has itself defined the scope of the Commission's inspection authority and that definition is reasonable within the requirement of the Fourth Amendment. It is neither too "indefinite", nor does it extend beyond what is "reasonably relevant" to the Commission's regulatory mandate. Associated confuses the traditional notions of "definiteness" and "relevance" arising from subpoena cases with the altogether different notions of specificity and relevance applicable to administrative inspections authorized by statute.

To determine whether the Congressional authorization of access to a licensee's records is reasonable in terms of the scope of records subject to inspection, the test is the nexus between the activities subject to regulation and the inspection authorized. In short, the permissible scope of inspection is commensurate with the breadth of regulation. See e.g., *Ray* v. *United States*, *supra*; and *Cooper's Express, Inc.* v. *Interstate Commerce Commission*, *supra*, *at* 341. Accordingly, since Part IV of the Act grants plenary regulatory authority over the economic aspects of interstate surface forwarders, the incidental inspectional authority over such licensees must accordingly be expansive. *See Fleming* v. *Montgomery Ward & Co.*, 114 F. 2d 384, 391 (7th Cir., 1940), *cert. denied*, 311 U.S. 670 (1940).

Unlike a subpoena which is issued in the context of a particular inquiry, an inspection authorization such as that contained in Section 412(d), which was enacted to enable the Commission to perform its legislatively mandated duties, is limited only by the regulatory jurisdiction of the agency. *See Cooper's Express, Inc.* v. *Interstate Commerce Commission*, *supra*, at 341. In effect, it is the scope of the regulatory authority that is the touchstone by which the "reasonableness" of the inspection authority is measured.

In contrast to a subpoena power, an inspection statute, such as Section 412(d), constitutes a *Congressional determination* as to scope and, therefore, relevance. Thus, if the scope of inspection is necessary to carry out a mandated governmental function, the Congressional determination manifested by the inspection authorization must be considered reasonable.

In this regard, the statute by defining the scope of the inspection in terms of "any and all accounts, books, records, etc.," satisfies the notice requirement associated with the warrant concept. As Judge Friendly, in *United States ex rel. Terraciano* v. *Montayne*, 493 F. 2d 682,

685 (2nd Cir. 1974) *cert. denied*, 419 U.S. 875 (1974), has noted:

> [When] an inspection [is] statutorily limited to the business records and goods of industries that are properly subject to intensive regulation in the public interest . . . the warrant would simply track the statute and would give the person who was the object of the search nothing more than he already had.

In summary, given the broad scope of the regulatory authority embodied in the Act and the compelling public interest in insuring a sound, economic and efficient surface forwarder system, the Congressional determination that any and all books, records, etc., kept by regulated surface forwarders are relevant to the Commission's regulatory functions, constitutes a "reasonable" determination and is not violative of the Fourth Amendment.

VII. UNDER ALL THE CIRCUMSTANCES OF THIS CASE, THE INSPECTION SOUGHT TO BE EXERCISED IS REASONABLE

As discussed, a licensed surface forwarder, such as Associated, cannot demonstrate a substantial expectation of privacy from Commission inspection of any of its records. It has chosen to accept a license in a regulated industry and, thus, must accept the concomitant surveillance that is necessary to assure that corporate behavior in this insulated and protected environment is consistent with the law and the public interest. Congress, through the enactment of Section 412(d), has also made a reasonable determination of the mode by which such scrutiny may be accomplished—on-site inspection of forwarder records. Under such circumstances, the Congressional authorization to inspect all of Associated's books and records must be deemed reasonable. Nor are there any special facts here present which would cause the inspection to be found unreasonable. The Commission employee

entered Associated's office during normal business hours for the lawful purpose of conducting an investigation into Associated's compliance with the Act. Associated was presented with the credentials of the agent. Associated was advised that access was sought to certain records of transactions maintained by Associated, and Associated was aware as to the nature of the investigation. Associated was sufficiently familiar with the "purposes of the inspector(s)" and "the limits of (their) task." *United States* v. *Biswell*, *supra*. No forcible entry or forcible demand was made. When Associated did object to the agent's continuation of his tasks, the agent complied and departed Associated's offices. Under all the circumstances present here, there is no basis to conclude the actions and announced authority of the Commission's employee rendered the inspection unreasonable.

Moreover, any documents that would have been reviewed pursuant to the inspection would have been protected from dissemination by Section 421(e) of Part IV of the Act, 49 U.S.C. 1021(e), which makes unauthorized disclosure of information obtained by exercise of the Section 412(d) inspection authority a criminal offense.

In summary, it is clear (1) that Associated has no substantial expectation of privacy as to its corporate files, (2) that the Congressional judgment embodied in Section 412(d) as to the scope of surface forwarder's records subject to the inspection authority is reasonable, (3) that there are no special facts here present which would render inspection of Associated's books and records unreasonable within the meaning of the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the Commission submits that the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing upon all parties by mailing copies thereof to all attorneys of record.

Dated this 2nd day of March, 1976.

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